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Separate but Equal Reconsidered: Religious Education and Gender Separation

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ABSTRACT

In November 2016, Britain's High Court ruled that sex segregation in religious schools is not discriminatory per se and is allowed as long as girls and boys receive education of equal quality. This decision was reversed by the Court of Appeals (CoA) in October 2017.

We critique both courts' position on a number of fronts. The High Court was quick to reject, and the CoA quick to dismiss as irrelevant, the similarities between race segregation (deemed inherently unequal) and sex segregation (which is not). The courts were also wrong to dismiss the claim that sex segregation constitutes expressive harm to women in general.

We examine whether religious or pedagogical considerations may override the argument against gender segregation, and whether institutional questions (e.g. if the school is private or public or if it is publicly funded) make a difference in this respect, issues not addressed by the courts.

KEYWORDS: sex or gender segregation, *Brown v Board of Education*, religious education, discrimination, gender equality.

1. INTRODUCTION

Ever since the landmark case of *Brown v Board of Education*,¹ in which the court renounced racial segregation as inherently discriminatory, the idea that separation of children in education facilities denotes a message of inferiority has reverberated in many jurisdictions. This article examines whether *Brown's* rationale applies also to school sanctioned segregation between boys and girls, and especially to sex separation in religious schools. This question was addressed recently by Britain's High Court in the case of *X School v. Ofsted*,² in which the court decided that separation of girls and boys in an Islamic school is not discriminatory per

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¹ 347 US 483 (1954).

² *The Interim Executive Board of X School v Ofsted* [2016] EWHC 2813 (X School).

se, as long as the educational services supplied to both was equal. In October 2017, the Court of Appeal (CoA) reversed, accepting Ofsted's position that separation was discriminatory.³

The overarching question this case raises is whether sex segregation in schools, *in and of itself*, is discriminatory and therefore prohibited under the Equality Act 2010. We approach it through four related issues. First, we argue that both courts (despite their opposite rulings) did not properly address the similarities between race segregation and sex segregation. In the particular context of religious schools, we suggest that sex segregation (like racial segregation) may convey a message of inferiority, suggesting that girls' (and women's) presence in the male-dominated public sphere is unwelcome. Given that traditional gender roles disadvantage women, segregation is a social mechanism that curtails girls' opportunities, and is therefore discriminatory. As a result, even if there is no evidence that the quality and content of education differs for boys and girls, the mere separation could bear detrimental consequences for girls.

The second matter concerns the institutional context in which practices of sex segregation take place, and the role of the state and its agents (Ofsted in this case) vis-à-vis practices of sex segregation. Should sex segregation be treated differently when it is performed in schools that are privately owned and funded compared to segregation in schools funded and owned by the state, or is segregation equally objectionable in all institutional settings? Does the voluntary nature of the segregation (or lack thereof) bear on its legitimacy?

Third, we question whether the burden of proof should have been placed on Ofsted to prove that segregation caused detriment, as both courts assumed, or on the school, to show that Ofsted's decision (or policy) was impermissible.

The fourth and final issue we address is the argument according to which the practice of sex segregation is a (religious or pedagogical) preference that parents have, and prohibiting it infringes upon their right to direct the education of their children. The courts viewed the religious motivation as irrelevant for its assessment of the issue at hand. We question this assertion, and contend in contrast, that the religious character of the separation may weigh towards its illegality; but we also suggest that the importance of a right to religion may be able to justify segregation, notwithstanding its social costs.

2. THE CASE

³ *Chief Inspector of Education, Children's Services and Skills v The Interim Executive School of Al-Hijrah School* [2017] EWCA 1426.

Al-Hijrah is a voluntary aided faith school with an Islamic ethos for boys and girls aged 4-16. As part of its Islamic ethos, the school separates boys and girls from Year 5 (age 9) in all school activities – lessons, assemblies, breaks, etc – creating de facto two single sex schools on one site.

In June 2016, Ofsted conducted an inspection of the school after which it issued a report finding the school ‘inadequate’ on several grounds, which included, prominently, the complete segregation of boys and girls. Ofsted found that sex segregation as it was performed by the school is discriminatory and thus prohibited under the EqA 2010. Ofsted did not assert that girls in Al-Hijrah were receiving inferior education, or a differentiated curriculum. Rather, Ofsted stated that the pupils were not given the social skills necessary to interact with individuals of the opposite sex, and therefore would be inadequately prepared for their future lives in modern Britain. Segregation, Ofsted insisted, ‘deprives both boys and girls, in an equivalent way, of the opportunity to interact with the opposite sex’.⁴

The school filed a claim against Ofsted’s report, arguing that *merely* separating boys and girls in itself did not constitute discrimination under EqA 2010. Since there was no evidence that the quality of education differed for boys and girls, Ofsted’s finding of the school as inadequate was without grounds.

The legal analysis focused on sections 13 and 85 of the Equality Act. Section 13 is the general clause that forbids direct discrimination of an individual on the basis, *inter alia*, of sex. Located in Part 6 (Education) of EqA, section 85 forbids a school from discriminating a pupil in admissions (s 85(1)) and ‘in the way it provides education’, in ‘access to a benefit, facility or service’, or ‘any other detriment’ (respectively ss 85(2)(a), (b) and (f)). Crucially, Schedule 11 of the Equality Act creates an important exemption for faith schools insofar as s 85(1) is concerned,⁵ but no similar exemption exists for the purpose of the rights guaranteed under s 85(2).

The High Court decided that segregation denies children the opportunity to interact with the opposite sex, and that the loss of opportunity was detrimental to children, as it failed to offer them opportunities or choices that reasonable people would value. However, the court continued, ‘the identification of a detriment is not, without more, to be equated with “less

⁴ *X School*, supra n 2 at para 40.

⁵ EqA, Schedule 11 at para 5.

favourable treatment’”,⁶ as required by section 85 of the EqA. Given that ‘no material distinction is found between the two sexes’, the High Court viewed the treatment as non-discriminatory.⁷ The CoA disagreed. Since the school’s boys cannot interact with girls, the CoA noted, each boy is treated less favourably to girls; and the same applies to girls.⁸ Gloster LJ, a minority in the CoA, went further, stating that girls suffer more significant practical and expressive harm from the segregation.⁹

Note that while the decision and its reasoning are groundbreaking, their application are restricted to mixed schools (such as X school). Single sex schools are explicitly excluded from the provision that prohibits consideration of a student’s protected characteristic in admissions.¹⁰

3. RACE VERSUS SEX SEGREGATION, INDIVIDUAL VERSUS GROUP DISCRIMINATION

As noted, the parties agreed that the quality and content of education that Al-Hijrah supplied its students, boys and girls, was equal. Therefore, the issue before the court was whether segregation as such could constitute discrimination. Although the High Court agreed that segregation caused detriment to children, manifested in the loss of an opportunity to interact with children from the opposite sex, it found it to be a detriment that burdened children of both sexes equally, as the two ‘groups’ (boys and girls) were similarly segregated. The CoA took a very different approach, rejecting the relevance of group comparison *in toto*, and preferred to adopt an individualist, person-centred, prism: ‘girls’ should not be compared to ‘boys’; instead: an individual student, boy or girl, should be compared to an individual girl or boy. And it is found that each boy is denied the opportunity to interact with girls, which girls enjoy; and each girl is denied the opportunity to interact with boys, which boys enjoys. Since the deprivation of social interaction ‘less favourable treatment’, each boy, and each girl, are treated in a manner that is discriminatory.¹¹

We contend that both approaches are misguided. The High Court was mistaken to reject Ofsted’s position according to which segregation imposes a particular burden on girls because it perpetuates historical social inequality. And the CoA unnecessarily narrowed the analysis by

⁶ *X School*, supra n 2 at para 118.

⁷ *X School*, supra n 2 at para 125.

⁸ *Al-Hijrah*, supra n 3 at para 51.

⁹ *Al-Hijrah*, supra n 3 at para 134 *ff*.

¹⁰ EqA, Schedule 11 disapplying section 85(1) in relation to single sex schools.

¹¹ *Al-Hijrah*, supra n 3 at para 53.

taking an individualistic approach. As we explain below, such an approach not only sends the wrong message as to the importance of group membership in general; it also misses a crucial opportunity to explain why some cases of segregations are discriminatory, while others are not.

In making its argument (that segregation imposes a burden on girls that is more significant than that which boys experience), Ofsted referred explicitly to the landmark case of *Brown v. Board of Education*, seeking to create an analogy between racial segregation and sex-based segregation.

Ofsted's and, consequently, the courts' reference to *Brown* is interesting. On the one hand, *Brown* is not only a seminal ruling in the history of the American Civil Rights movement. Its impact reached beyond American jurisprudence, and American society.¹² Moreover, bearing in mind that at the heart of *Brown* lies the question of 'can separate be equal' in the context of education, the parties in *Al-Hijrah*, and the Court, would be amiss not to account for the similarities and dissimilarities. On the other hand, *Brown* is not, of course, *directly* applicable. Moreover, as a product of a very different history and legal context, caution is called for when considering transplanting legal doctrines and concepts from one jurisdiction into another. Gunther Teubner warned that such transplants may serve as 'legal irritants', that will 'unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.¹³ In particular, even within the context of race discrimination, the move from *Brown* to *Al-Hijrah* involves a shift from a legal context in which a country struggled to eradicate the legacy of slavery to a country that, generally, views cultural diversity as a possible positive vehicle towards integration and social inclusion.¹⁴

Notwithstanding these concerns, section 13(5) of the EqA creates a legal bridge between American jurisprudence of the 1950s to twenty-first century Britain that, in a sense, makes *Brown* redundant, by stating that: 'If the protected characteristic is race, less favourable treatment includes segregating B from others'. In other words, Britain has codified *Brown* in

¹² Minow, *In Brown's Wake – Legacies of America's Educational Landmark* (2010); Hepple, 'The European Legacy of *Brown v Board of Education*' (2006) 2006 *University of Illinois Law Review* 605.

¹³ Teubner, 'Legal Irritants: How Unifying Law ends up in New Divergences', in Hall and Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2001) 418; Otto Kahn-Freund deployed a similar metaphor in 'On Uses and Misuses of Comparative Law' (1974) 37(1) *MLR* 1 at 21.

¹⁴ Hepple, *supra* n 7 at 620-2.

legislation, so there seems no need to revert to the original source. Unless, of course, *Brown* has more to offer than disqualifying race-based segregation in education.

To see if that is the case, we need to examine the reasoning behind the *Brown* decision, and to ask whether its rationale applies to segregation of other kinds, and in particular to sex segregation. There are several possible ways to understand the court's judgment in *Brown*. The first possible interpretation of *Brown* is that separation in education, of any kind, cannot be equal. In Chief Justice Warren's plain and probing words: 'We conclude that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal'. There is no ambiguity here, nor are there caveats (apart, perhaps, from tailoring the assertion only to 'public education'). CJ Warren's position could apply to all forms of 'separation', and not only to those based on race; whether or not the state is the driving force for the separation (or is, in fact, opposed to it); to separation of classrooms, and not only to separation of schools; and regardless of motivation, religious or otherwise. Such a wide interpretation of *Brown* would, clearly, apply to *Al-Hijrah*. However, it seems that it would also apply to a very wide category of separations, that do not seem to be as morally repugnant as race segregation, such as separation of students according to their age, place of residence, or, more controversially, their academic abilities.

It could be argued, on the other hand, that any attempt to read into *Brown* an aversion to segregation of other sorts is misguided and artificial and that it should be interpreted as applying only to the facts of the case, namely to racial segregation.

We would argue that *Brown*'s rationale does not apply exclusively to race. And yet, *Brown*'s rationale limits its breadth and application. CJ Warren explains that 'to separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community'. And, later, that 'the policy of separating the races is usually interpreted as denoting the inferiority of the negro group'.¹⁵ Segregation, therefore, is discriminatory, unconstitutional and immoral if and when it sends a derogatory message to the segregated group, and is thus contingent on historical, social and psychological contingencies within specific societies. A third interpretation of *Brown* emerges, therefore, according to which segregation should be prohibited in cases in which it denotes a message of inferiority, and only in these cases.

¹⁵ *Brown*, supra n 1 at 494.

Arguably, this approach perhaps aligns with a more doctrinal position, according to which segregation is not always suspicious, but when the allocating criterion is a protected characteristic (race and ethnicity, sex, nationality, sexual orientation and perhaps – age and disability) – it is inherently discriminatory. Such an approach seems to have guided Ofsted’s brief before the CoA. It stated that: ‘protected characteristics are protected because they all have long histories in which one group has been regarded as fundamentally different or inferior in ways which ... persist in power imbalances which continue to exist across society at large’.¹⁶ According to this interpretation of Brown, sex segregation should be deemed discriminatory if it denotes a sense of inferiority for girls. We move on to argue that it does.

We begin by assessing the High Court’s explicit rejection of the comparison between racial and sex segregation. In doing so, the High Court seems to rely, largely, on the animosity that drives racial segregation, an animosity that, it suggests, is far less salient in the case of sex segregation. Thus, the court states that ‘it was apparent that the whole point of putting these children in separate institutions was to emphasise their inferiority: this was precisely why the Southern States were doing it. It followed that the African American, profoundly aware of these reasons, would inevitably experience the “feeling of inferiority”’.¹⁷ Thus, despite the fact that the education of black pupils was not found inferior to that of white pupils, segregation was inherently discriminatory. This was not the case, in the court’s opinion, in the case of sex segregation.¹⁸

Indeed, the extreme animosity and hostility that characterized racial segregation in the pre-*Brown* years is not demonstrated in sex segregation. An American court recently expressed the legal consequences of this social intuition:

Unlike the separation of public school students by race, the separation of students by sex does not give rise to a finding of constitutional injury as a matter of law. Individuals are harmed when they attend schools in which students are separated on the basis of race because such separation ‘generates a feeling of inferiority ... that affect [students’] hearts and minds in a way unlikely to ever be undone’.

¹⁶ Cited in *Al-Hijraj*, supra n 3 at para 153; see also *ibid* at para 135, 151.

¹⁷ *X School*, supra n 2 at para 136.

¹⁸ Although the court was willing to assume that women have been and still are, the group with minority power in society. *X School*, supra n 2 at para 133, 134.

[Brown, 494]. ... No such historically-grounded injury has been recognized as inherent in the separation of students by sex.¹⁹

And yet, while the history of the subjugation of African-Americans is indeed different from the parallel history of women, one need not go far to find evidence of institutional, prevalent social prejudice and subordination throughout history, even within the very realm of education. Women were not admitted to the most prestigious, Ivy League universities in the US until as late as 1969 (Yale and Princeton), 1977 (Harvard) and even 1981 (Columbia University). In the UK, Oxford University began admitting female students in 1920, about 800 years after its establishment, and even then, and for over half a century, only to far less prestigious, poorly equipped, all-women colleges. In other words, if the history of slavery has ramifications for the way we judge race segregation, centuries of excluding women from education must carry weight when we turn to assess sex segregation in this context.

In doing so, we should look to the reason for excluding girls and women from the public sphere, including education. This exclusion is often justified, particularly in religious communities, by reference to the claim that co-education leads to sexual tension which is sinful. Girls (from a certain age) and women are viewed as responsible for this sexual tension by their very presence, therefore they ought to be separated from boys and men, who are, supposedly, the victims of this disruptive presence. The message that sexuality is threatening, and that women are to blame for it, is made clear to girls by way of rules and requirements regarding their attire, speech, and behaviour (rules that apply to their life generally, and not only in school).²⁰

Separating boys and girls in school is also justified by reference to the idea that they have different social roles, that they are expected to have different aspirations and to lead different lives. Designating separate roles for girls and boys restricts girls' opportunities, directing them to traditional gender roles that were the basis for social exclusion and subordination.²¹ Although men too are victims of traditional gender roles, that exclude them

¹⁹ *A.N.A v. Breckinridge County Board of Education* 2009 WL 899441 (30th March, 2009)

²⁰ Zine, 'Honour and Identity: An Ethnographic Account of Muslim Girls in a Canadian Islamic School', (2008) *Topia* 19:35; AbouEl Fadl, *Speaking in God's Name* (2001) at 236; Mernissi, *Beyond the Veil: Male-Female Relationships in Modern Muslim Society* (1987) 45.

²¹ Rapaport, Garb and Penso, 'Religious Socialization and Female Subjectivity: Religious Zionist Adolescent Girls in Israel,' (1995) 68 *Sociology of Education* 48-61; El-Sanabary, 'Female Education in Saudi Arabia and the Reproduction of Gender Division', (1994) 6 *Gender and Education* 141.

from life paths that are considered feminine, in terms of social, political and economic power, adhering to traditional gender roles disadvantages women more than men. Moreover, assuming that men and women are assigned different social roles may also implicitly suggest that women do not have the cognitive, physical and emotional capabilities required for roles assigned to men, thus clearly implying that women are inferior to men.

Both justifications for sex segregation (preventing sin and training for different roles) lead to the conclusion that even if the kind of contempt and animosity that is demonstrated in racial segregation is absent in sex segregation, a message of inferiority is clearly present. This derogatory message, if internalized by girls, can foster low self-esteem and impede their development. Boys suffer no similar detriment, and therefore the disadvantage that boys and girls suffer from segregation is not parallel.

It is important to stress that there may be cases in which sex (or, for that matter, race) segregation does not send this derogatory message. When single sex education is initiated and designed to empower girls and prepare them for leadership roles, the negative expressive element may be absent (although the need to separate them from boys in order to foster excellence may imply that they cannot compete on an equal footing to boys).²² Interestingly, in light of its role, single sex education can thus be justified for girls, but not necessarily for boys.²³ For example, in the celebrated *Virginia Military Institute* case,²⁴ Justice Ginsburg decided, for the US Supreme Court, that the Institute's male-only admissions policy was unconstitutional, finding that the female alternative was a 'pale shadow of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence'.²⁵ In the decision, however, Justice Ginsburg voiced a positive view on single sex educational institutions, as long as they adhere to their mission 'to dissipate, rather than perpetuate, traditional gender classifications'.²⁶ Segregation driven by this, positive, intention may end up ultimately disadvantaging girls, however it seems that it is not wrongful in the same way, as it does not, *a-priori*, denote a message of inferiority concerning girls and the roles

²² DeBare, *Where Girls Come First: The Rise, Fall, and Surprising Revival of Girls' Schools* (2005); Salamone, *Same, Different, Equal: Rethinking Single-Sex Schooling* (2003).

²³ Minow, *supra* n 12 at 54.

²⁴ *United States v Virginia*, 518 US 515 (1996).

²⁵ *Ibid* 517.

²⁶ *Ibid* 534. Although there is some ambiguity in this passage, as it is unclear whether Ginsburg places emphasis on the intention or on the actual consequences of segregation, regardless of the intention.

they are destined to fill in society. The same rationale seems to apply to (far less prevalent) ethnic based schools designed to empower members of minority groups, which have recorded notable success in this regard.²⁷

Religious schools that favour sex separation tend to cater to communities that have a traditional and, consequently, patriarchal approach, which aims to perpetuate the subordination of women by men.²⁸ In particular, traditional religious communities tend to be very concerned about female modesty, as they view female sexuality as a threat, constantly tempting men beyond their control.²⁹ In addition, such societies tend not to view girls, and women, as equally capable, talented and suited for leadership roles.

Such attitudes can be weaved into the education of boys and girls effectively if they are educated separately, thus creating a strong reason to oppose separate education in religious schools more than separation in other institutions. As Cass Sunstein notes, ‘some of the pernicious forms of sex discrimination are a result of the practices of religious institutions, which can produce internalized norms of subordination’.³⁰

When segregation is driven by religious motivations, we need to examine the justifications of the religious commitment to determine whether the message segregation sends is derogatory. As we detailed above, in the case of *Al-Hijrah* and, perhaps, in similar cases concerning traditional religious schools, segregation does indeed entail a particular practical and expressive harm to girls. On this matter, the High Court and the majority in the CoA rejected Ofsted’s position. In particular, and in a manner that is unfortunate, these positions rested on formalistic grounds, namely – that the Ofsted report did not contain any assertion regarding the effect that sex segregation had on women, and the fact that it may create or reinforce misogynist attitudes among boys towards girls.³¹

This formalist, judicial approach is disappointing. The refusal to take into account well-established, background social circumstances that are highly pertinent to a case, tends to stand

²⁷ Merry, *Equality, Citizenship and Segregation: A Defence of Separation* (2013). See also *Missouri v. Jenkins* 515 US 70 (1995) (segregation does not always denote inferiority).

²⁸ Moller Okin, ‘Is Multiculturalism Bad for Women’ in Joshua Cohen, Matthew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women* (1999) at 7, 13.

²⁹ Hostovsky Brandes ‘Separate and Different’ (2012) 45 *Israel Law Review* 235 at 239-40.

³⁰ Sunstein, ‘On the Tension between Sex Equality and Religious Freedom’ in Satz and Reich (eds) *Towards a Humanist Justice: The Political Philosophy of Susan Moller Okin* (2009) 129, at 132.

³¹ *Al-Hijrah*, supra n 3 at para 109-20; *X School*, supra n 2 at para 133-44.

in the way of progress. It is worth mentioning here one of the most celebrated legal arguments in the history of American litigation – the Brandeis Brief, which succeeded in convincing the United States’ Supreme Court to uphold a law protecting women’s health.³² It did so by offering two pages of legal argument, and 96 pages of social research on the lives of working women. Thus, it provided ‘a healthy antidote to highly apologetic forms of discourse and judgment ... a necessary demystifying step toward the goal of social reform’.³³

Fortunately, Gloster LJ, in the minority in the CoA, showed how the relevant information is not only accessible, but can also be legitimately incorporated as *legally relevant*. Though not explicitly, she seems to do so by moving from the particular (the school) to the general (society at large). She thus finds it extremely relevant that Ofsted’s inspectors found books in the school’s library that portray women as inferior, state that a woman should obey her husband, deny a women’s right to refuse sex to her husband and endorse a man’s right to beat his wife. The High Court explicitly separated this issue from the discussion regarding segregation, as Ofsted only cautiously suggested that the books support the argument that girls suffered less favourable treatment.³⁴ However, as noted by Gloster LJ,³⁵ this finding is highly relevant and can serve as an indication of the general attitude towards women that is endorsed by the school (irrespective, it should be emphasised here, of how ‘Islam’ in general perceives women, an issue that did not concern the court, and is also irrelevant for our analysis) – one that endorses that men’s ability ‘to dominate and chastise’ women. She similarly notes that students submitted work, which was approved by teachers, expressing patriarchal views such as ‘men should earn more as they have families to support’ and ‘women are emotionally weaker’.³⁶

The more general observation, discussed under the heading of ‘expressive harm’, suggests that gender segregation results from, and reinforces, ultra-conservative and fundamentalist norms, prevalent in certain interpretations of Islam, in which ‘control of women and, ultimately, the removal of women from the public sphere, is key’.³⁷ In a startling show of judicial nerve, she asserts that the ‘fact that there has been no reported judgment to date on

³² *Muller v Oregon* 208 US 412.

³³ Horwitz, *The Transformation of American Law 1860-1960: The Crisis of Legal Orthodoxy* (1992) at 209.

³⁴ *X School*, supra n 2 at para 116.

³⁵ *Al-Hijraj*, supra n 3 at para 141.

³⁶ *Ibid*.

³⁷ *Ibid* at para 150.

expressive harm in domestic law does not concern me... Evidence is not needed to inform the court of the historic, and indeed recent and continuing, struggles of women for equal rights...'.³⁸ And yet, Gloster LJ goes beyond this and refers to the Government's (in particular – the Department for Communities and Local Government's) own *Casey Report*, which include findings of 'abuse and unequal treatment of women enacted in the name of cultural or religious values'.³⁹ The fact that the majority refused to address the Report, and that the minority had to explicitly justify referring to it, is bemusing, and constitutes a regressive judicial approach. Government reports, like scholarly, academic work, should inform judicial reasoning and ground them in the real world. It seems paradoxical that social reality is ignored in the name of objective truth.

4. GOD IS IN THE DETAILS: PUBLIC VERSUS PRIVATE AND THE POWER TO OPT-OUT

The courts framed the case as dealing with the question of (sex-based) segregation as discrimination. However, it may be the case that institutional distinctions, primarily the distinction between private and public schools, have normative import.

The United States provides an interesting base for comparison. The 1972 Education Amendment's Title IX distinguishes state funded schools from privately funded schools in this regard, stating that 'no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity *receiving Federal financial assistance*'.⁴⁰ Notwithstanding this unambiguous guidance, in 2006 the US Department of Education issued a regulation which provided recipients of funds with the power to set up schools or classrooms that are segregated by sex, if they adhere to four conditions: first, the single sex class or school is motivated by the aims to improve educational achievement of its students and to meet their particular, identified needs; second, that the school implements its objectives in an 'evenhanded' manner; third, that student enrollment in the single sex class is 'completely voluntary'; and fourth, that the school provides all students with a 'substantially equal coeducational class' in the same subject or

³⁸ Ibid at para 151, 153.

³⁹ Ibid at para 168.

⁴⁰ 20 USC 1681 (emphasis added).

activity.⁴¹ While the regulation led to an exponential growth of both segregated schools and segregated classrooms (in co-ed schools) in the state sector,⁴² there is also evidence of judicial challenges to segregation practices that were successful.⁴³

The second and fourth conditions seem straightforward: if girls have ‘separate but unequal’ facilities and opportunities or are taught in a manner that is inferior to that of girls, the illegality of the practice is clear. But if we are faced with a ‘separate but equal’ scenario, the regulations suggest that some practices may be more legitimate than others. The decision will depend on the degree of publicness of the school; the existence of voluntary choice; and the aim that drives it. We turn to address these institutional issues now, leaving the last point, namely the aim of segregation, for a separate discussion in the following section.

We begin with the public nature of the school. In rejecting the analogy to *Brown*, the High Court observes that segregation in the US was mandated by the government whereas in the instant case the segregation was initiated and carried out by a minority school with the full support of the parents.⁴⁴ This was significant, the court stated, because the derogatory message that segregation may denote is especially severe in the case of state mandated segregation that can reasonably be understood as the reflection of the attitudes and values of wider society. In our view, this is a salient point.

All else being equal (i.e. bearing in mind a given type of segregation), it seems that the court should be more inclined to intervene the stronger the involvement of the state in the practice of segregation. This involvement may be manifested along several axis: whether the school is a state school or a private school; whether the segregation was initiated by the school or by parents; does the school receive state funding; is the school authorized and supervised by a state regulator; is the school a local comprehensive school or a school of choice. Amongst those criteria, the more the school falls on the ‘public’ side of the continuum (publicly owned, funded or supervised, local enrolment, school initiated segregation), the more segregation is problematic, as its practices can be seen (perhaps mistakenly) as deriving from society’s attitudes and values. In contrast, the less the state is involved in the segregation practice (a school is privately run, privately funded, segregation initiated by the parents and school,

⁴¹ 34 C.F.R. § 106.34(b)(1)(i)-(iv).

⁴² Medina, ‘Boys and Girls Together, Taught Separately in Public School’ *New York Times* (10 March, 2009). <http://www.nytimes.com/2009/03/11/education/11gender.html>

⁴³ *Doe v Vermilion Parish School Board* (US Court of Appeals, 5th Circuit, 2011).

⁴⁴ *X School*, supra n 2 at para 141.

students have an option of a different school), the expressive force of segregation is weakened. In some of these cases, moreover, segregation is performed by parents and communities despite government aversion to segregation.

It could be argued, however, that the message that segregation conveys is received by the children attending the school, regardless of the nature of state involvement. The state is a wholly amorphous entity for children, who are more affected by the school's concrete authority than by an official state message. Still, the expressive harm is no doubt worse when segregation is mandated or supported by the state.

Where does Al-Hijrah fit within this matrix? As a 'maintained' school, it is overseen by the local authority (as distinct from the relatively new 'free' schools, or academies, which need not concern us here). Such schools must also follow the national curriculum and national teacher pay and conditions. In addition, such schools are non-fee paying, with the local authority paying all running costs, central government paying 90% of building costs, leaving the charity with 10% of the latter.⁴⁵ This leads 'faith' schools to be justifiably viewed as 'state schools'. Interestingly, as an Islamic-based school, Al-Hijrah belongs to a very small minority. In fact, 99% of faith schools are Christian. As of 2013, there were only 12 Islamic-based maintained schools in the UK, alongside 34 Jewish, 2000 Roman Catholic, and 4600 Church of England faith-maintained schools.⁴⁶

Notwithstanding the above, faith schools are distinct from (other) state schools in three respects: first, the land and buildings are normally owned by a religious charity, and a governing body is responsible for running the school and employing the staff. Second, admission policy may give preference to members of a particular faith if the school is oversubscribed (consequently, if the school is undersubscribed, it must admit students of all faiths). Regrettably, the court did not expand on the admissions practice of the school, a consideration that could impact on the 'voluntariness' criterion, which in turn could be relevant for the analysis as a whole. Third, it may employ teachers who hold a specific faith, if it can be shown to be an 'occupational requirement'.⁴⁷

⁴⁵ Oldfield, Hartnett and Bailey, *More than an Educated Guess: Assessing the evidence on faith schools* (2013) at 19.

⁴⁶ Ofsted, *Inspecting Faith Schools* (January 2013) 7.

⁴⁷ Schedule 9 of the EqA. See Department for Education, *The Equality Act 2010 and Schools* (May 2014) 43. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf

Given the mixed nature of faith-maintained schools, we argue, the expressive harm cannot be taken lightly. Although it is not quite as severe as state mandated *de-jure* segregation, and despite Ofsted's active attempts to prevent it, the ties between the state and the school are sufficient to create the expressive harm.

The second institutional factor that has implications for the analysis concerns the student, or her parent's, power to *choose* whether to take part in the practice of segregation. This factor is more elusive than may seem, initially. One may argue that choice is guaranteed since students who object to segregated education may choose a different, co-educational, school. The courts, however, had no patience for such an argument. Regardless of whether or not the claimant's case succeeded, this specific claim - that a student was not denied choice because she could transfer to a different school (or, in an analogous case, that an employee was denied choice because she could leave her job⁴⁸) - was rejected.⁴⁹

Even when a coeducational option exists within the school, which was not the case in *Al-Hijrah*, parents' choice regarding the segregated option may be deemed unsatisfactory. In a recent American case – *Doe v Vermillion*⁵⁰ - the existence of classes in which children were separated on the basis of their sex was challenged, even though students could, *formally*, choose to study in co-educational classes. The Court of Appeals found that this 'choice' was not a real one, since the school's Principal called parents to convince them to register their children in single sex classes, and the co-educational classes were disproportionately filled with children with special needs and lower attainment.

This jurisprudential position, which we support, is only reinforced in the case of faith schools, because parents may be pressured by the community to enroll in faith schools, or because they genuinely feel a religious obligation to enroll their children in a religious school, even if they do not support sex segregation. As a result, religious parents may, at least on some occasions, be forced to accept sex segregation in schools as an inevitable part of their religious practice.⁵¹ To be considered as a justification for segregation, choice, therefore, must be effective and substantive rather than formal. In the case of education, in which the individual

⁴⁸ *Enveida and Others v United Kingdom* ECHR 37 (2013).

⁴⁹ *R (on the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁵⁰ No. 09-cv-1565 (W.D. La. Apr. 19, 2010).

⁵¹ Hostovsky Brandes, *supra* n 29 at 235.

affected by the decision, namely the child, typically has little say in the choice, the problem is emphasised.

One final institutional comment concerns the difference, enshrined in the EqA, between single sex schools and coeducational schools to which the law, and the current ruling, do not apply. Clearly, if there are only boys (or girls) in a particular school, prohibition on treating them differently is meaningless. However, if indeed sex segregation is, in and of itself, demeaning to women and preserves their traditional and unequal roles in society, this argument applies equally to mixed schools as to, and maybe even more forcibly, same sex schools in which no interaction whatsoever exists between boys and girls. The existing difference in law, therefore, cannot be justified, and may also incentivise religious schools to transform into single sex schools.⁵²

5. THE BURDEN OF PROOF

Crucial to the outcome in *X School* was the High Court's implicit assumptions concerning the party that holds the burden of proof in this case, Ofsted or Al-Hijrah, and regarding the nature of that burden. While the court did not refer to this issue explicitly, it assumed that the onus was on Ofsted to persuade the court that segregation caused detriment to girls and concluded that Ofsted had failed to do so. The Court of Appeal did not address this issue, but we contend that more should be said on this matter.

From the American regulations depicted above, we learn that the US government is not agnostic insofar as sex segregation is concerned. The default normative position, and thereby also the default legal rule, is that boys and girls should study together,⁵³ and American courts have accepted this position. Thus, the Appeals Court in *Doe* stated that a plaintiff who challenges a segregative practice 'does not have to show discriminatory intent'. Rather, the

⁵² Yorke, "Religious schools may split in two to avoid Ofsted punishment after Court of Appeal ruling" *The Daily Telegraph* (28 October 2017).

<http://www.telegraph.co.uk/news/2017/10/28/religious-schools-may-split-two-avoid-ofsted-punishment-court/>

Agerholm, "Government allows faith school to split in two to avoid gender segregation law" *The Independent* (11 November 2017) <http://www.independent.co.uk/news/education/education-news/government-faith-school-split-hasmane-an-high-al-hijrah-two-boys-girls-gender-segregation-law-jewish-a8042386.html>

⁵³ Griffiths, 'Ofsted boss says mixed schools are better' *The Sunday Times* (28 September 2014) http://www.thesundaytimes.co.uk/sto/news/uk_news/Education/article1464621.ece

burden is placed on the party supporting the segregation ‘to demonstrate an “exceedingly persuasive” justification for the classification’.⁵⁴

Ofsted’s normative position is very similar to that of the American government in its opposition to the separation of boys and girls. As part of an Ofsted training session in 2010, participants were given the following instruction:

Where a school chooses, in exceptional circumstances, to segregate lessons, assemblies and other activities on the basis of gender, there must be good educational reasons for doing so. The school will need to justify these reasons. If the school has a religious character it has to demonstrate how they ensure the religious character of the school does not disadvantage the overall education.⁵⁵

A memorandum which reflects the same approach was circulated to Ofsted officials. Moreover, this attitude reflects the approach across the wider political spectrum, and of public opinion, in Britain.⁵⁶ In support of this normative position, one can refer to the public sector duty to promote equality, whose relevance the High Court was quick to dismiss,⁵⁷ and the Court of Appeal did not address. This duty, found in section 149 of the EqA, requires a public authority, in the exercise of its functions, to ‘have due regard to the need’ to not only eliminate discrimination, but also to promote equality of opportunity and foster good relations between persons who share a protected characteristic and those who do not. In particular, it provides that this duty involves the need to tackle prejudice and promote understanding.⁵⁸ In other words, the duty to promote equality far exceeds the obligation to eliminate discrimination.⁵⁹ Sandra Fredman, for example, notes with cautious optimism⁶⁰ a series of cases in which challenges based on section 149 were successful in addressing redistributive ills, such as cuts to welfare services,⁶¹ post office closures,⁶² and the termination of funding for a social

⁵⁴ *Doe*, supra n 50 at 9.

⁵⁵ *X School*, supra n 2 at para 14.

⁵⁶ See, eg, Syal and Weaver, “Universities UK withdraws advice on gender segregation in lectures” *The Guardian* (13 December 2013), noting that the former Prime Minister ‘wanted a ban on gender-segregated audiences on campus even where men and women voluntarily separated themselves’.

<https://www.theguardian.com/education/2013/dec/13/universities-uk-withdraws-advice-gender-segregation>

⁵⁷ *X School*, supra n 2 at para 80, 149.

⁵⁸ EqA 2010 s 149(5).

⁵⁹ *Cf* Holmes ‘Anti Discrimination without Equality’ (2005) 68 *MLR* 175.

⁶⁰ Fredman, ‘The Public Sector Equality Duty’ (2011) 40 *ILJ* 405, 426.

⁶¹ *R (Meany, Glyn and Sanders) v Harlow District Council* [2009] EWHC 559 (Admin).

⁶² *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

programme.⁶³ Thus, it is not the case, as the High Court would have it, that the claim that discrimination occurred and the breach of public sector duty ‘stand and fall together’.⁶⁴ It is *Ofsted’s* public sector duty with which the court should have concerned itself, and reprimanding a school for segregating on the basis of sex is, quite reasonably, part of this duty. This interpretation of *Ofsted’s* public sector duty should affect, at the very least, the allocation of the burden of proof.

Whether or not one agrees with the normative position, it is curious that the issue of burden, or onus, of proof does not appear in both courts’ decisions. This point is crucial; taking it seriously could have led to a very different judicial approach, and accordingly to a different legal outcome. For, as a matter of doctrine, the presumption of regularity – *omnia praesumuntur rite esse acta* – suggests that in the absence of evidence to the contrary, it is presumed that a public body acted on the basis of existing evidence and followed proper procedures.⁶⁵ Even more relevant is the deference doctrine, according to which, barring serious evidence to the contrary, courts should presume that government agencies are better positioned to interpret the statutes that governs their work.⁶⁶ At the very least, it is up to the claimant to challenge the agency’s understanding of the statute. Instead, the High Court seemed to frame the challenge for *Ofsted*, the *respondent*, very differently. It was the government agency that was set a relatively high bar: a *constitutional* challenge – to prove that discrimination occurred. This bar required not only proving that girls (and boys) suffered a detriment by lack of choice (a point that the court was willing to concede),⁶⁷ but also that that detriment amounted to ‘less favourable treatment’, under the EqA. Arguably, a more fitting legal framework would be to place the onus on the claimant, the school, to challenge *Ofsted’s* decision through *administrative* tools, namely to prove why it was impermissible for *Ofsted*, as a regulator, to evaluate a school negatively due to an educational practice that causes detriment to its students.

Indeed, it seems that the school assumed the mindset we advocate, and submitted ten grounds of challenge, of which the majority were administrative: irrationality, bias, ultra vires, lack of evidence, and lack of warning. Only two grounds, which converged into one, focused on the fact that the separation under inquiry was not discriminatory under the EqA. And yet,

⁶³ *R (on the application of Luton BC) v Secretary of State for Education* [2011] EWHC 217. (Admin) Queen’s Bench Division.

⁶⁴ *X School*, supra n 2 at para 149.

⁶⁵ *Trevelyan v Secretary of State* [2001] 3 All ER 166.

⁶⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶⁷ *X School*, supra n 2 at para 118-121.

these were the grounds on which the courts based their decisions. But, again, **Ofsted should not be forced to establish that separation was discriminatory under EqA, but merely that it was within Ofsted's discretion to negatively assess a school performing it.** Interestingly, the claimant did not put forward a constitutional argument that it had at its disposal: one which refers to the religious nature of the school, and the respective rights of children and parents, a matter to which we turn to now.

6. RELIGIOUS JUSTIFICATIONS AND PARENTAL PREFERENCES

The discussion above suggests that the motivation behind segregation often plays a part in discerning the message conveyed by segregation. There is often a direct link between the motivation underlying segregation and what segregation expresses. And yet, both courts state that if sex segregation was deemed discriminatory, the fact that the motive for segregation is religious (rather than some other animosity toward a particular protected group) is irrelevant.⁶⁸

At one point, the CoA seemed to tread some way towards a different approach, which takes into account the reason for segregation, by highlighting cases which, under Schedule 3, paragraph 27 of the EqA 2010, provision of a service solely to a member of one sex is not illegal sex discrimination. These cases, derived from the Explanatory Notes, include separate male and female wards in a hospital; separate male and female changing rooms in a department store; and a massage service provided to women only by a female therapist in her clients' homes because she feels uncomfortable massaging men in that environment.⁶⁹ But later on, it explicitly rejects motive as relevant stating that: 'it is common ground, and well-established by authority, that the motive for discrimination is irrelevant'.⁷⁰ In its reasoning, the CoA refers to the *JFS* case,⁷¹ in which the Supreme Court noted that relying on a religious reason cannot be exculpatory, if the result is discriminatory. We suggest, however, that the irrelevance of motivation should be limited to circumstances when the defendant seeks to use it as a shield, claiming that the discrimination was *not* driven by an intent to exclude or humiliate a particular group, but rather by a more general (often – religious) basis. It would seem awkward, however, to derive the reverse conclusion from this approach, i.e. that such a motivation (i.e. to exclude

⁶⁸ *X School*, supra n 2 at para 101; *Al-Hijraj*, supra n 3 at para 159-60, citing *R (on the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁶⁹ *Al-Hijraj*, supra n 3 at para 68.

⁷⁰ *Al-Hijraj*, supra n 3 at para 81.

⁷¹ *R(E) v Governing Body of JFS* [2009] UKSC 15 at 20, 35, 65.

or humiliate) should *not* be relevant when assessing if discrimination is legal, or not. Indeed, it seems that our understanding is accepted by the High Court, which noted that if Ofsted would have been able to establish that ‘Islamic schools segregate *because* their religion (or their interpretation of it) views girls and women as second-class citizens, I would have been duty-bound to address the issue’.⁷² In other words, the reason, or motivation, is completely relevant, if it is a nefarious one.

Above we discussed the potentially negative role that religious motivations play in the context of sex segregation. We now address the possibility that religious justification may redeem objectionable separation.

A religious motivation for segregation, we argued above, does not rule out the discriminatory nature of segregation, which is associated with the derogatory message it denotes. In the case of religious schools, sex segregation typically sends a message of inferiority toward girls and is therefore discriminatory in much the same way that race segregation is degrading for racial minorities. Therefore, as the court stresses, merely establishing that a religious requirement underlies segregation does not rule out discrimination.

However, the fact that segregation is motivated by religious commitments may have redeeming qualities, legally speaking. Article 9 of the European Convention of Human Rights provides the right to freedom of thought, conscience and religion. And Article 2 of the First Protocol to the ECHR provides that

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

This constitutional and philosophical approach is made concrete within the EqA itself. Thus, while section 85(1) forbids discrimination in admissions, and section 85(2) forbids discrimination in treatment, Part 2, paragraph 5 of Schedule 11 disapplies these sections with regards to ‘schools of religious character’ and with respect to ‘matters relating to religion or belief’. While it is not clear whether sex segregation falls within such matters, it should be stated that those are clearly broader than acts of worship or religious observance, which are

⁷² *X School*, supra n 2 at para 145 (emphasis added).

treated separately within Schedule 11 (paragraph 6). Curiously, this was not mentioned in the judgment.

It seems, therefore, that contra to the courts' assertions, a religious argument voiced by parents in favour of sex segregation in religious schools might outweigh an antidiscrimination requirement. Comparing sex segregation to race segregation in this respect reveals an interesting dis-analogy. In two American cases, involving sectarian schools that facially discriminated on the basis of race and were argued to be justified on a religious basis, the courts concluded that there had not been a bona fide religious concern, and so neither court had to confront the issue of whether religious argument could override the prohibition on segregation.⁷³ It is not, we think, a coincidence that the courts were not persuaded by the schools' religious claim because, unlike sex-based segregation, race segregation is not a common requirement of the main religious denominations. Therefore, the different intuitions we may have regarding race and sex segregation, namely that religious conviction cannot justify racial segregation but can justify sex segregation, may simply hinge on the fact that we do not believe that religions truly demand racial separation. Instead, we are inclined to think, religious arguments are simply used to mask racism. Sex segregation does not raise the same suspicion, mainly because we are indeed familiar with religious requirements to separate men and women in many spheres.

One may even argue that the public sector duty, discussed above, should operate not only to accommodate girls and women, but also religious minorities (in this case – Muslim parents) and to promote inclusive policies.⁷⁴

Should religious justifications override the concern for equality, assuming that sex segregation indeed has a sincere religious justification? Clearly, some kind of balance must be struck, yet it is unclear what this balance should be. The argument that a particular practice is justified, or even mandated, by religion, should not be accepted without scrutiny. It is true that in *Eweida*, the European Court of Human Rights rejected the domestic (British) courts'

⁷³ *Fiedler v. Marumso Christian School*, 631 F.2d 1144 (4th Cir. 1980) (concerning the expulsion of a student based on her refusal to end her relationship with a black male student); *Brown v. Dade Christian Schools*, 555 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (a Baptist school refused to enrol a black student). See generally Note, 'Section 1981 After Runyon v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race', (1977) 1977 *Duke L.J.* 1219.

⁷⁴ Vickers 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31 *Legal Studies* 135 at 145-6.

approach, maintaining that while freedom of religion must refer to a belief system that ‘denotes views that attain a certain level of cogency, seriousness, cohesion and importance’, where those are established, ‘the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed’.⁷⁵ But it also continues to note that ‘it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief’.⁷⁶ In particular, while the British Government’s argument (that the wearing of a cross was not a manifestation of belief) was rejected in the instant case, the Court cited with agreement two earlier cases of relevance. In the first, the House of Lords rejected the claim that the ban on corporal punishment in schools interfered with the claimants’ religious beliefs.⁷⁷ Lord Nicholls stated that the court will recognise a belief worthy of protection only if it satisfied ‘some modest, objective minimum requirements ... The belief must be consistent with basic standards of human dignity and integrity’.⁷⁸ In the second case, a 14-year old Muslim girl refused to attend a secular, maintained school if it would not allow her to wear a jilbab – a long, coat-like garment.⁷⁹ The school, it should be noted, was composed of 79% Muslim students, had a female Muslim Head teacher and allowed for three uniform options, of which one – the shalwar kameeze, was worn by Muslim, Hindu and Sikh female students. The House of Lords rejected the student’s claim but differed on the rationale. Lord Scott, for example, suggested that Article 9 was not engaged at all, as “Freedom to manifest one’s religion” does not mean that one has the right to manifest one’s religion at any time and in any place and in any manner that accords with one’s beliefs’.⁸⁰ Baroness Hale, in contrast, was ready to accept that there was interference with Article 9, but such interference was justified, as it ‘had the legitimate aim of protecting the rights and freedoms of others’.⁸¹

Another relevant consideration in this regard is the extent to which a prohibition of sex separation will elicit fierce objection on the part of religious communities, that will have a backlash effect. For example, if believers view sex segregation as a crucial tenet of their faith, state coercion may be ineffective. Parents will prefer to withdraw their children from schools

⁷⁵ *Eweida and Others v United Kingdom* ECHR 37 (2013) at para 81.

⁷⁶ *Ibid* at para 82.

⁷⁷ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15.

⁷⁸ *Ibid* at para 45.

⁷⁹ *R (on the Application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁸⁰ *Ibid* at para 86.

⁸¹ *Ibid* at para 94.

altogether – choosing possibilities such as home schooling or private religious schools in their stead. This option may be worse for girls, who may be denied the benefits of state education that, notwithstanding the segregation, is still preferable in terms of their prospects and equality.

The fact that segregation was motivated by religious reasons, therefore, *does* carry normative weight that can bear on the desirable legal outcome. It will have to be considered alongside the extent of the detriment caused by segregation, determined among other things by the institutional circumstances described in the previous section, as well as more general social circumstances (such as other informal educational activities that may be co-educational, the extent of gender inequality experienced by the children, etc) that can alleviate or aggravate the harm caused by segregation.

Viewing the religious argument as a separate consideration that may, in some cases, override the prohibition on segregation, rather than as part of the inquiry toward whether segregation was discriminatory, is an attractive way to think about this complicated normative question. It enables us to maintain an unwavering aversion toward sex segregation in religious schools, insisting that it perpetuates the inferior status of women, *especially* in religious communities, and yet, to recognize the moral and legal complexity of interference in religious communities' education systems. This position balances the conflicting interests involved within the complicated realm of religious education. It is also in line with current legal and educational practice, in the UK and beyond, in which religious schools of many denominations practice sex segregation. While this practice should be discouraged, it is unlikely to be eliminated altogether.

7. CONCLUSION

Education systems in multicultural societies face the challenging dilemma of allowing parents and communities to educate their children in accordance with their beliefs and values, while not renouncing the system's commitment to liberal values such as gender equality and its responsibility to ensure the development and autonomy of the children belonging to the religious communities. In commenting on the case of *Al-Hijrah* we do not purport to offer a comprehensive argument regarding the permissibility of sex segregation in religious schools. What the discussion does suggest, however, is that sex segregation, at least in religious schools, cannot be accepted uncritically. If, as we posit, sex-segregation denotes a message of inferiority, and if this message is expressed regardless of the institutional status of the school

(private or public; state funded or not; the voluntary nature of the segregation), this requires a thorough rethinking of the desirable reaction toward religious schools that separate boys and girls.

Considering that sex segregated religious schools are a common phenomenon, prohibiting sex segregation within co-educational schools entails a radical change from the status quo. Moreover, the fact that some of these schools are considering, following the decision by the CoA, to transform into single sex schools which, for the time being, and somewhat paradoxically, are not illegal, is yet another example of the unintended, and even regressive, consequences of legal decisions that seem, facially, to be progressive.

While this should not, in itself, deter policy makers from pursuing a desirable policy, it raises doubt as to whether full prohibition is a feasible option at this time, and perhaps more piecemeal solutions should be adopted. Arguably, Ofsted, the accountable and professional agency in this regard, sought to test the waters and carve a path along those lines. While reasonable people may disagree with its conclusion, we suggest that such a discussion must take into account, rather than ignore, the issues raised here.